A

Litar Sistem Adilkap Sdn Bhd v Lee Teak Hock & Anor

B COURT OF APPEAL (PUTRAJAYA) — APPEAL NO A-02(NCC)(A)-1508–08 OF 2019
MARY LIM, HAS ZANAH MEHAT AND ABU BAKAR JAIS JJCA
12 JUNE 2020

C *Companies and Corporations — Winding up — Whether justifiable or equitable — Respondents relied upon ss 465(1)(f), (h) and (j) of the Companies Act 2016 to wind up company — Whether none of those provisions were applicable — Whether respondents took inordinately long time to petition for the winding up — Whether this tended to show they had acquiesced in the matters complained of*
D *and that their petition was motivated by their removed as directors of the company — Whether since one of the petitioners had been complicit in the matters complained of the petition should be denied since he had not come to court with 'clean hands' — Whether since all members of the company were against the winding up and the company was viable and solvent and contributing to the health*
E *of the economy it ought not to be wound up*

Two years after being removed as directors of the appellant in 2017, the respondents petitioned for the appellant's winding-up on the grounds that: (a) the appellant had contravened s 465(1)(j) of the Companies Act 2016 ('the
F CA') by carrying on a money-lending business without being duly licensed to do so; (b) s 465(1)(f) of the CA had been contravened in that the appellant's directors had acted in the affairs of the company for their own interests rather than for the interests of the members as a whole or had acted in a manner which appeared to be unfair or unjust to the members; and (c) it was just and
G equitable to wind up the appellant under s 465(1)(h) of the CA. The appellant was incorporated in 1993 for the purpose of carrying on the business of a driving institute. The first respondent ('R1') who was a director of the appellant from 1993–2000 and again from June 2016–October 2017, had signed two resolutions of the company in the year 2000 — the first was for the
H appellant to take over a moneylending licence from the owner ('LTK') of a sole proprietorship ('the Enterprise') without any payment in return; the second resolution was to pay the Enterprise RM77,517.13 as consideration for taking over its business of moneylending. Neither of the matters in the two resolutions took place, ie, the appellant neither took over the said licence nor the
I moneylending business of the Enterprise. However, the appellant had paid some monies to the Enterprise. The High Court granted the winding up petition. The instant appeal was against that decision.

Held, unanimously allowing the appeal and setting aside the winding up order:

(1) None of the three statutory provisions in the Companies Act 2016 relied upon by the respondents were grounds to wind up the appellant. On the contrary, the evidence showed that the winding up of the appellant was not justifiable or equitable (see para 52).

(2) The winding up could not be premised on s 465(1)(j) of the CA because the term 'licensed business' in that provision did not include moneylending. The High Court had wrongly applied s 465(1)(j) to the facts of the case. Section 2 of the CA defined 'licensed business' as having the meaning assigned to it in s 2 of the Financial Services Act 2013 ('the FSA') and s 2 of the Islamic Financial Services Act 2013 ('the IFSA') both of which did not include moneylending which the appellant was alleged to have been involved in. Section 465(1)(j) of the CA was only applicable in the winding up of a company which, without a valid licence, was involved in banking business, insurance business or investment banking business under the FSA or Islamic banking business, takaful business, international Islamic banking business or international takaful business under the IFSA (see paras 20–26).

(3) The respondents took more than a decade to file the winding-up petition based on matters that arose from three resolutions of the company. And it took nearly five years to file the petition in relation to the transfer on 24 November 2014 of RM239,077.39 to the Enterprise. On the facts of the case, there was inordinate delay on the respondents' part. The time taken to apply for the winding up was an important consideration because inordinate delay would show that the respondents had acquiesced to the resolutions and transfers of monies to the Enterprise. It would also tend to show on balance of probabilities that the petition was filed in response to the respondents' removal as directors of the appellant (see paras 36–37 & 43).

(4) There was no evidence to suggest that when the winding up petition was filed, the appellant was still engaged in moneylending. The timing of the petition was material. The matters complained of by the respondents did not persist at the time of presentation of the petition. The resolutions and matters arising thereafter were many years before the filing of the petition. In short, the matters were already stale (see paras 38 & 40).

(5) The first respondent had agreed to the passing of the first two resolutions concerning the moneylending licence and the moneylending business. Since he was complicit in the matters that arose from the first two resolutions, the relief for winding-up of the appellant had to be denied to the respondents. There was evidence to show that the first respondent with LTK had instructed the bank to pay RM171,272.74 from the appellant to the Enterprise. A petitioner seeking to wind up a company had to come to court with clean hands. The facts narrated do not show this in the present appeal (see para 44).

(6) Almost all the members of the appellant did not agree that the appellant should be wound up. There was no loss in respect of monies that were transferred to the Enterprise. The evidence showed that the sum of RM239,077.39 was returned to the appellant and this was admitted by the respondents. This amount included interest for the RM171,272.74 that was handed to the Enterprise earlier (see paras 46–47).

(7) The appellant was a going concern before it was ordered to be wound up and there was no evidence to prove that it was not doing well or was running at a loss. A viable, solvent company assisted the economy of a nation and provided jobs especially in the present trying times. For this reason, the appellant should not be simply wound up. The winding up of a company should be a remedy of the last resort (see paras 48–49).

[Bahasa Malaysia summary

Dua tahun setelah dipecat sebagai pengarah, perayu pada tahun 2017, responden mengemukakan petisyen untuk penggulungan perayu dengan alasan bahawa: (a) perayu telah melanggar s 465(1)(j) Akta Syarikat 2016 ('AS') dengan menjalankan perniagaan pinjaman wang tanpa diberi lesen sewajarnya untuk melakukannya; (b) s 465(1)(f) AS telah dilanggar kerana pengarah perayu telah bertindak dalam urusan syarikat untuk kepentingan mereka sendiri bukannya untuk kepentingan anggota secara keseluruhan atau telah bertindak secara tidak adil atau wajar kepada anggota; dan (c) adalah adil dan saksama untuk menggulungkan perayu di bawah s 465(1)(h) AS. Perayu ditubuhkan pada tahun 1993 dengan tujuan menjalankan perniagaan sebuah institusi memandu. Responden pertama ('R1') yang merupakan pengarah perayu dari tahun 1993–2000 dan sekali lagi dari bulan Jun 2016–Oktober 2017, telah menandatangani dua resolusi syarikat pada tahun 2000 — yang pertama adalah untuk perayu untuk mengambil alih lesen pinjaman wang dari pemilik ('LTK') milikan tunggal ('Perusahaan tersebut') tanpa pembayaran sebagai balasan; resolusi kedua adalah membayar Perusahaan tersebut sebanyak RM77,517.13 sebagai balasan untuk mengambil alih perniagaan pinjaman wang. Tidak satu pun dari kedua-dua resolusi tersebut terjadi, iaitu, perayu tidak mengambil alih lesen tersebut atau perniagaan pinjaman wang Perusahaan tersebut. Namun, perayu telah membayar sejumlah wang kepada Perniagaan tersebut. Mahkamah Tinggi membenarkan permohonan penggulungan. Rayuan semasa adalah terhadap keputusan tersebut.

Diputuskan, sebulat suara membenarkan rayuan dan mengetepikan perintah penggulungan:

(1) Tidak satu pun dari tiga peruntukan undang-undang dalam Akta Syarikat 2016 yang diguna pakai oleh responden adalah alasan untuk menggulung perayu. Sebaliknya, bukti menunjukkan bahawa penggulungan perayu tidak adil atau wajar (lihat perenggan 52).

(2) Penggulungan tidak boleh berpandukan kepada s 465(1)(j) AS kerana istilah 'perniagaan berlesen' dalam peruntukan tersebut tidak termasuk pinjaman wang. Mahkamah Tinggi telah terkhilaf dalam mengguna pakai s 465(1)(j) pada fakta kes. Seksyen 2 AS mendefinisikan 'perniagaan berlesen' sebagai makna yang diberikan kepadanya dalam s 2 Akta Perkhidmatan Kewangan 2013 ('APK') dan s 2 Akta Perkhidmatan Kewangan Islam 2013 ('APKI') yang keduanya tidak termasuk pinjaman wang yang didakwa dijalankan oleh perayu. Seksyen 465(1)(j) AS hanya terpakai dalam penggulungan syarikat yang mana, tanpa lesen yang sah, terlibat dalam perniagaan perbankan, perniagaan insurans atau perniagaan perbankan pelaburan di bawah APK atau perniagaan perbankan Islam, perniagaan takaful, perniagaan perbankan Islam antarabangsa atau perniagaan takaful antarabangsa di bawah APKI (lihat perenggan 20–26).

(3) Responden mengambil masa lebih dari satu dekad untuk memfailkan petisyen penggulungan berdasarkan hal-hal yang timbul dari tiga resolusi syarikat. Dan mengambil masa hampir lima tahun untuk memfailkan petisyen berkenaan dengan pemindahan pada 24 November 2014 sebanyak RM239,077.39 kepada Perusahaan tersebut. Berdasarkan kepada fakta kes, terdapat kelewatan yang melampau dari pihak responden. Masa yang diambil untuk memfailkan penggulungan adalah pertimbangan wajar kerana kelewatan yang melampau akan menunjukkan bahawa responden telah bersetuju dengan resolusi dan pemindahan wang kepada Perusahaan tersebut. Ini juga cenderung menunjukkan imbangan kebarangkalian bahawa petisyen tersebut difailkan sebagai tindak balas terhadap pemecatan responden sebagai pengarah perayu (lihat perenggan 36–37 & 43).

(4) Tidak ada bukti yang menunjukkan bahwa ketika petisyen penggulungan difailkan, perayu masih menjalankan pinjaman wang. Waktu petisyen tersebut adalah material. Perkara-perkara yang dibangkitkan oleh responden tidak berlanjutan pada semasa pemfailan petisyen. Resolusi dan perkara yang timbul adalah setelaj bertahun-tahun sebelum pemfailan petisyen. Pendek kata, perkara tersebut sudah basi (lihat perenggan 38 & 40).

(5) Responden pertama telah setuju untuk mengesahkan dua resolusi pertama mengenai lesen pinjaman wang dan perniagaan pinjaman wang. Oleh kerana dia terlibat dalam hal-hal yang timbul dari dua resolusi pertama, relif penggulungan perayu harus ditolak kepada responden. Terdapat bukti yang menunjukkan bahawa responden pertama dengan LTK telah mengarahkan bank untuk membayar RM171,272.74 dari perayu kepada Perusahaan tersebut. Pempetisyen yang ingin menggulung syarikat harus datang ke mahkamah dengan tangan yang

bersih. Fakta-fakta yang diceritakan tidak ditunjukkanya dalam rayuan semasa (lihat perenggan 44).

(6) Hampir kesemua anggota perayu tidak bersetuju bahawa perayu harus digulung. Tidak ada kerugian berkaitan wang yang dipindahkan kepada Perusahaan tersebut. Bukti menunjukkan bahawa sejumlah RM239,077.39 telah dikembalikan kepada perayu dan ini diakui oleh responden. Jumlah ini termasuk faedah untuk RM171,272.74 yang telah diserahkan kepada Perusahaan tersebut sebelumnya (lihat perenggan 46–47).

(7) Perayu menjadi perhatian sebelum diperintahkan untuk digulung dan tidak ada bukti untuk membuktikan bahawa ianya tidak berjalan dengan baik atau mengalami kerugian. Syarikat yang solven dan yang berdaya maju membantu ekonomi sebuah negara dan memberikan pekerjaan terutama pada masa-masa sekarang. Atas sebab ini, perayu tidak boleh digulungkan. Penggulungan syarikat harus menjadi jalan keluar terakhir (lihat perenggan 48–49).]

Cases referred to

Dato Ting Check Sii v Datuk Haji Mohamad Tufail bin Mahmud & Anor [2007] 7 MLJ 618, HC (refd)

Eng Man Hin @ Ng Mun Heng & Anor v King's Confectionery Sdn Bhd & Ors [2006] 4 MLJ 421; [2005] 8 CLJ 77, HC (refd)

Fildes Bros Ltd, Re [1970] 1 WLR 592, Ch D (refd)

Foo Jong Wee & Ors v Haji Afifi bin Haji Hassan [2016] MLJU 1673; [2016] 6 CLJ 696, CA (refd)

Hoy Pak Kwai (suing on behalf of himself and for the benefit of the company Aerial Product Industries Sdn Bhd) v Leong Kon Fah & Ors [2007] 1 MLJ 508; [2007] 1 CLJ 121, CA (refd)

Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application [1994] 2 MLJ 789, HC (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)

Liew Jui Hua & Ors v Johor Property (M) Sdn Bhd [1996] MLJU 454; [1998] 2 CLJ Supp 34, HC (refd)

Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor [1996] 1 MLJ 113, FC (refd)

Senson Auto Supplies Sdn Bhd, Re [1988] 1 MLJ 326 (refd)

Supreme Envy Sdn Bhd v Abul Rahim bin Sinon (suing and acting as personal representative and representing the estate of Sinon bin Karnen, the deceased) & Anor [2017] 1 MLJ 43, CA (folld)

TM Feroze Khan & Ors v Meera Hussain bin TM Mohamed Mydin [2000] 1 MLJ 321, FC (refd)

Weng Wah Construction Co Sdn Bhd v Yik Foong Development Sdn Bhd [1994] 2 MLJ 266, HC (refd)

Yai Yen Hon & Ors v Lim Mong Sam @ Lim Ah Tee [1997] 2 MLJ 190, CA (refd)
Yew Chye Heng & Anor v Venice Hill Resort Living Sdn Bhd [2007] 7 MLJ 566, CA (refd)

Legislation referred to

Central Bank of Malaysia Act 2009 s 2(1)
Companies Act 1965 (repealed by the Companies Act 2016)
Companies Act 2016 ss 2, 465(1)(j), (1)(f), (1)(h)
Financial Services Act 2013 ss 2, 193
Islamic Financial Services Act 2013 s 2
Moneylenders Act 1951

Appeal from: Companies Winding Up No AA-28NCC-59–09 of 2018 (High Court, Ipoh)

Wong Hin Loong (James Huntzen Ong and Chun Chee Chong with him) (CC Chun & Co) for the appellants.
Amir Faliq (Syahidah Ismail and Naim Kamaruddinn with him) (Amirfaliq & Syahidah) for the respondent.

Abu Bakar Jais JCA:

INTRODUCTION

[1] This is an appeal by the appellant against the decision of the High Court that allowed the winding up petition filed by the respondents against the appellant.

BRIEF FACTS

[2] The appellant before being wound up, was a company incorporated under the Companies Act 1965 since 1993 with the object of engaging in the business of a driving institute. The respondents were directors and shareholders of the appellant. The first respondent was appointed as a director from 1993–2000 and from June 2016–October 2017. The second respondent became a director from 1 April 2017–6 October 2017. They were removed from being directors by the appellant on 6 October 2017 on the basis of alleged misappropriation of some funds. The first respondent is the father of the second respondent.

[3] On 12 January 2000 there was a resolution ('resolution 1') passed by the appellant for a money lending licence belonging to Lee Tiak Kooy ('LTK') who was the director and biggest shareholder of the appellant to be transferred to the appellant without any payment. LTK held this licence in another entity, TK

Lee Enterprise ('Enterprise'). The appellant at p 4 of its written submission pointed out that Enterprise is a sole proprietorship owned by LTK. There is no dispute this licence eventually was never transferred despite resolution 1. The first respondent signed resolution 1.

[4] On 10 March 2000 another resolution was passed ('resolution 2') by the appellant. Resolution 2 is for the appellant to take over the business of money lending from Enterprise owned by LTK by paying RM77,517.13. This also failed to happen despite resolution 2 although there is evidence that an amount of money was paid to Enterprise. The first respondent also signed resolution 2.

[5] On 23 June 2004 there was another resolution passed by the appellant, signed by LTK and another director, Mohd Nasir bin Othman ('resolution 3'). This resolution was for RM171,272.74 to be transferred or paid to Enterprise. There is no dispute the first respondent did not sign this resolution.

[6] Ten years later, on 24 November 2014 another amount of RM239,077.39 from the appellant went to Enterprise. Two days later this amount was returned to the appellant by Enterprise.

[7] Essentially the respondents were not satisfied that the appellant was also engaging in money lending illegally and moneys had been transferred to Enterprise unlawfully.

[8] Of significance is that the petition to wind up the appellant was filed only on 19 September 2019.

[9] The petition to wind up the appellant was filed for the following reasons:

(a) the appellant had contravened s 465(1)(j) of the Companies Act 2016 ('the CA') for carrying out a money lending business without being duly licensed;

(b) the appellant's directors had acted in the affairs of the company in the directors' own interests rather than in the interests of the members as a whole or acted in any other manner which appears to be unfair or unjust to members in contravention of s 465(1)(f) of the CA; and

(c) it is just and equitable the appellant be wound up pursuant to s 465(1)(h) of the CA.

THE HIGH COURT'S DECISION

[10] For the application to wind up the appellant pursuant to s 465(1)(j) of the CA which is for carrying out a licensed business without being duly licensed, the learned High Court judge found that Enterprise is not a subsidiary of the appellant. Enterprise is owned by LTK. Enterprise is a partnership in the business of money lending and not related at all to the appellant. The company search did not show that Enterprise is a subsidiary of the appellant at any point of time. There were resolution 1 and resolution 2 passed by the appellant for the transfer of money lending business from Enterprise to the appellant and one of these required payment to be made. However the money lending business was never transferred to the appellant.

[11] The appellant did represent to the public that it was involved in the money lending business despite not having a licence for it. The learned High Court judge further found the appellant also admitted it was involved in this business through its own financial statement from 2006–2010.

[12] Thus the learned High Court judge decided the appellant should be wound up pursuant to this statutory provision.

[13] In respect of the application for winding up pursuant to s 465(1)(f) of the CA on the basis that the appellant's directors had acted in their own interests or acted in a manner which is unfair or unjust to its members, the learned High Court judge also decided that the appellant should be wound up on this ground.

[14] First, this is because resolution 2 had contradicted resolution 1. Resolution 2 had allowed for payment of RM77,513.13 to Enterprise, while initially, resolution 1 only approved the transfer of the money lending business by Enterprise to the appellant without any payment. And this payment was indeed made to Enterprise according to the finding of the learned High Court judge.

[15] His Lordship also found that based on resolution 3 another amount of RM171,272.74 was transferred from the appellant to Enterprise without any valid reasons. This is an abused of the appellant's financial accounts as Enterprise is not a subsidiary of the appellant.

[16] The learned High Court judge also found it was not true that the first respondent knew about this transfer as the resolution for this did not specify the reason for the transfer.

[17] The learned High Court judge also accepted that the respondents did not know the reasons for the transfer of moneys initially but came to know only subsequently from the accountants that it was for Enterprise to renew its licence for the money lending business.

[18] In respect of the application for winding up pursuant to s 465(1)(h) of the CA for the reason it is just and equitable for the appellant to be wound up, the learned High Court judge found that since the appellant was involved in a licensed business without being duly licensed, it was appropriate that this provision be invoked against the appellant. And since it has been found that the appellant's directors had acted in their own personal interests, it was also appropriate to wind up the appellant pursuant to this statutory provision.

[19] Hence the High Court allowed the respondents' petition to wind up the appellant pursuant to the three stated statutory provisions of the CA.

OUR ANALYSIS AND DECISION

[20] It is most convenient to begin with the decision of the High Court to wind up the appellant pursuant to s 465(1)(j) of the CA. This statutory provision states as follows:

> The Court may order the winding up if the company has carried on a *licensed business* without being duly licensed or the company has accepted, received or taken deposits in Malaysia, in contravention of the Financial Services Act 2013 or the Islamic Financial Services Act 2013, as the case may be. (Emphasis added.)

[21] First there is a need to note the word 'licensed business' above. What it means is explained by s 2 of the CA that states:

> 'licensed business' has the meaning assigned to it in the Financial Services Act 2013 [Act 758] or the Islamic Financial Services Act 2013 [Act 759], as the case may be.

[22] Second, pursuant to the above, what is the meaning of licensed business in the Financial Services Act 2013 ('the FSA')? For this, s 2 of the FSA states:

> 'licensed business' means banking business, insurance business or investment banking business.

[23] Third what is the meaning of 'licensed business' in the Islamic Financial Services Act 2013 ('the IFSA')? For this s 2 of the IFSA states:

> 'licensed business' means Islamic banking business, takaful business, international Islamic banking business or international takaful business.

[24] Thus what is clear is that s 465(1)(j) of the CA must be read together as it cannot stand without making reference to the respective s 2 of the FSA and

IFSA. And the definitions of 'licensed business' in both FSA and IFSA do not include money lending under Moneylenders Act 1951 ('the MA') which the appellant is alleged to be involved in.

[25] Therefore, with respect to the High Court, the winding up of the appellant cannot be premised on s 465(1)(j) of the CA. The very basis to wind up the appellant based on this section of the CA cannot be maintained because money lending is not within the meaning of 'licensed business' in this statutory provision. This provision with respect had wrongly been applied by the High Court in relation to the facts of this case.

[26] Further, s 465(1)(j) of the CA is only applicable to wind up a company which without a valid licence, is involved in banking business, insurance business or investment banking business under FSA and Islamic banking business, takaful business, international Islamic banking business or international takaful business under IFSA. Again, it cannot be applicable for money lending under the MA.

[27] This is reinforced by s 193 of the FSA which allows only Bank Negara (Central Bank) and certainly not the respondents to apply for the winding up of a company under this statute. This provision states:

> ... the Bank may recommend to the Minister and the Minister may on such recommendation, authorize the Bank to file an application to the High Court for the winding up of an institution and the High Court may order the winding up of an institution pursuant to the application filed by the Bank under this Division.

[28] The word 'Bank' above means Central Bank of Malaysia pursuant to s 2 of the FSA read together with s 2(1) of the Central Bank of Malaysia Act 2009.

[29] In fairness to the High Court, the legal argument above pertaining to the word 'licensed business' in s 465(1)(j) of the CA was not canvassed by the appellant at the time of the hearing of the petition. It only came up before us for the first time in the present appeal. Nonetheless we are minded to hear the argument as it is purely on a point of law. In this regard we would follow the Court of Appeal's decision in *Supreme Envy Sdn Bhd v Abul Rahim bin Sinon (suing and acting as personal representative and representing the estate of Sinon bin Karnen, the deceased) & Anor* [2017] 1 MLJ 43. In this case the Court of Appeal decided that it would hear a point of law as it could be heard at any time despite not being raised earlier.

[30] We will now proceed to address the winding up pursuant to s 465(1)(f) and 465(1)(h) of the CA. As they are interrelated, we believe it can be dealt with together.

[31] In respect of the decision by the High Court to wind up the appellant pursuant to s 465(1)(f) of the CA, this provision states as follows:

> The Court may order the winding up the company if the directors have acted in the affairs of the company in the directors' own interests rather than in the interests of the members as a whole or acted in any other manner which appears to be unfair or unjust to members.

[32] Whilst for the winding up pursuant to s 465(1)(h) of the CA, this provision states as follows:

> The Court may order the winding up the company if the Court is of the opinion that it is just and equitable that the company be wound up.

[33] In the case of *Yew Chye Heng & Anor v Venice Hill Resort Living Sdn Bhd* [2007] 7 MLJ 566 the main reason advanced by the petitioner for the winding up of the developer company was because the company was unable to pay its debt. Another reason advanced was that the company had constructed a block of condominium without the necessary licence. It was argued that if the winding up order is not made, then this would tantamount to legalising the illegal act of the respondent company. The petition was allowed by the High Court in this case. Thus operating without a licence has been considered as illegal and where a winding up order has been issued. Hence if the operation of a company is founded on illegality, a winding up of a company can also be applied based on the ground that it is just and equitable. Nonetheless, whether such winding up is allowed depends on the circumstances of each case (see the Court of Appeal's case of *Foo Jong Wee & Ors v Haji Afifi bin Haji Hassan* [2016] MLJU 1673; [2016] 6 CLJ 696).

[34] As could be recalled, the learned High Court judge allowed the winding up based on s 465(1)(f) of the CA as there were two resolutions passed by the appellant. This is with regard to resolution 1 indicating the money lending business of Enterprise will be transferred to the appellant without any payment and resolution 2 by the appellant approving payment of RM77,513.13 to Enterprise for this transfer. And the learned High Court judge found that this amount was paid to Enterprise.

[35] In this regard, it should be recalled that resolution 1 was passed on 12 January 2000. While resolution 2 was passed on 10 March 2000. On 23 June 2004 resolution 3 was passed by the appellant. And it should also be recalled, the petition to wind up the appellant was filed by both respondents only on 19 September 2019.

[36] However based on the foregoing, it took more than a decade for both respondents to file the winding up petition in respect of matters arising from

these three resolutions. And it took nearly five years to file the petition in relation to the transfer on 24 November 2014 of RM239,077.39 to Enterprise.

[37] In this regard, both respondents took too long a time. The time it has taken the respondents to apply for the winding up of the appellant is an important consideration whether the petition ought to be allowed or vice versa. Taking too long a time lends credence to the argument there was inordinate delay that showed the respondents had acquiesced to the resolutions and transfers of moneys to Enterprise. It also tends to show on a balance of probabilities that they had filed the petition only because they were removed as directors of the appellant as indicated on 6 October 2017.

[38] Although the company search as of 3 August 2018 (p 74 of *ikatan teras perayu* — exh L1) revealed that the appellant's type of business was still a driving institute and a licensed moneylender, it must necessarily be a question of fact whether it was still engaged in money lending when the petition was filed. And in this regard, when the petition was filed there was no evidence to suggest the appellant was still engaged in money lending.

[39] The Federal Court's case of *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113 dealt with a case of winding up and the issue that came before the court was whether an act of oppression on a shareholder persisted at the time of presentation of the winding up petition. The Federal Court decided:

> Where attention is called to particular acts or omissions, it is sufficient that the effects of a single act or omission are such that they persist at the date of presentation of the petition.

[40] The timing of the petition is therefore material. However in the appeal before us, we could not find that the matters complained by the respondents still persist at the time of the presentation of the petition. The resolutions and matters arising thereafter were many years before the filing of the petition. In short the matters are already stale.

[41] The Federal Court quoted with approval the High Court's case of *Re Senson Auto Supplies Sdn Bhd* [1988] 1 MLJ 326 where it is said as follows:

> It is settled law that delay by petitioners in initiating proceedings after they have realised that they have been victims of a scheme of oppression will induce the court to refuse relief, since this indicates that they have acquiesced in the conduct complained about and their complaints are not therefore made in good faith ...

[42] For the winding up of a company based on just and equitable ground, Megarry J in the case of *Re Fildes Bros Ltd* [1970] 1 WLR 592 said:

A

> If on the facts existing when the petition was presented it was then just and equitable to wind up the company but subsequently it was ceased to be so, I do not think a winding up order should be made.
>
> ... a winding up order under this head must be based on subsisting facts and not on past history.

B

[43] We are aware of the Federal Court's case of *TM Feroze Khan & Ors v Meera Hussain bin TM Mohamed Mydin* [2000] 1 MLJ 321 that held whether there is inordinate delay depends on the facts and circumstances of each particular case. Based on the facts explained, we are of the view there was indeed inordinate delay in the present case.

C

[44] Further as indicated, the first respondent agreed to the passing of these resolutions. Thus, the first respondent was a party who knew fully well of these resolutions. Since the first respondent was complicit in the matters that arose from the first two resolutions, no relief should be granted in respect of the petition to wind up the appellant. There was also evidence to show that the first respondent with LTK had instructed the bank for the payment of RM171,272.74 from the appellant to Enterprise. In this regard, a petition to wind up a company can only be granted if the petitioner is before the court with clean hands. The facts narrated do no show this in the present appeal (see *Yai Yen Hon & Ors v Lim Mong Sam @ Lim Ah Tee* [1997] 2 MLJ 190 and *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application* [1994] 2 MLJ 789).

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[45] In *Eng Man Hin @ Ng Mun Heng & Anor v King's Confectionery Sdn Bhd & Ors* [2006] 4 MLJ 421; [2005] 8 CLJ 77 Ramly Ali J (later FCJ) said:

> This is a case where the petitioners are trying to make a mountain of alleged inequities out of a molehill. The allegations are made in an attempt to wind-up the company under the just and equitable provision of s 218(1)(i) of the Companies Act 1965. The petitioners have failed to discharge the burden of proof that there is a violation of their equitable rights or any established equitable principle as to why they are not bound by the company's articles of association. They have also failed to prove the existence of the legitimate expectation, the breach of which forms the basis of their petition. *The facts show that the petitioners' complaints relate to actions taken by the respondents for the benefit of the company due to the petitioners' own conduct. The petitioners are therefore the cause for the actions taken. As a result, the petitioners are not entitled to seek the aid of this court's equitable jurisdiction because they have not come with clean hands.* (Emphasis added.)

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[46] It is also relevant to note that almost all the members of the appellant do not agree that the appellant be wound up. Interestingly the respondents chose not to answer this assertion in their affidavits.

[47] There is also no loss in respect of the moneys transferred to Enterprise. In this regard, there is evidence the amount of RM239,077.39 was returned to the appellant on 26 November 2014. This amount includes interest for the amount RM171,272.74 which was handed earlier to Enterprise. The respondents admitted the return of RM239,077.39.

[48] The appellant in fact was a going concern before the winding up. There is no evidence to prove that it was not doing well and was running at a loss. A viable solvent company assists the economy of a nation. It provides jobs for its employees especially in the present trying times. For this reason too the appellant should not be simply wound up. In the Court of Appeal's case of *Hoy Pak Kwai (suing on behalf of himself and for the benefit of the company Aerial Product Industries Sdn Bhd) v Leong Kon Fah & Ors* [2007] 1 MLJ 508; [2007] 1 CLJ 121 James Foong JCA (as he then was) in delivering judgment said:

> Though I believe that the appellant has lost confidence with the first and second respondents and vice versa I am of the opinion that the substratum of the company is still intact. The company continues to operate as an entity separate and distinct from its shareholders. As an ongoing profitable enterprise there is no reason why the court should order it to be wound up or force one shareholder to buy out the other just because one does like the other. Without the appellant as a director, API is, relatively speaking, well managed and this is manifested by the rather substantial dividends dished out from time to time to shareholders for their investments. Under these circumstances, there is no justifiable reason why the court in exercising its judicial discretion, based on just and equitable rule, should accede to the demands of the appellant particularly when there is cogent evidence that he did not come with clean hands.

[49] All the foregoing findings based on the facts narrated are also consistent with the principle that winding up of a company should be a remedy of the last resort (see *Dato Ting Check Sii v Datuk Haji Mohamad Tufail bin Mahmud & Anor* [2007] 7 MLJ 618; *Liew Jui Hua & Ors v Johor Property (M) Sdn Bhd* [1996] MLJU 454; [1998] 2 CLJ Supp 34 and *Weng Wah Construction Co Sdn Bhd v Yik Foong Development Sdn Bhd* [1994] 2 MLJ 266).

[50] On the whole we are conscious that we should not normally intervene against the decision of the lower court. However in the Court of Appeal's case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 it is said as follows:

> Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. *But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.* (Emphasis added.)

[51] Based on the principle above, we are of the view as supported by all the reasons explained, there is indeed a need for appellate intervention in this case.

CONCLUSION

[52] The appellant should not be wound up based on the three statutory provisions of the CA as found by the High Court. The evidence on the contrary indicates that the winding up of the appellant would not be justifiable or equitable.

[53] Accordingly we are unanimous in allowing the appeal and setting aside the winding up order that was made.

Appeal allowed unanimously and winding up order set aside.

Reported by Ashok Kumar